Supreme Court, U. S.
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No. 80-68

In the Supreme Court of the United States

OCTOBER TERM, 1980

KITTY LOUISE STROUSE and LORI GAY WINTER, by and through her natural mother and next friend, KITTY LOUISE STROUSE,
Petitioners,

VERSUS

GLENN DALE CARTER, Associate District Judge of the District Court of Pottawatomie County, Oklahoma,
Respondent.

On Writ of Certiorari to the Supreme Court of Oklahoma

REPLY BRIEF TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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November, 1980

TABLE OF CONTENTS

	PAGE
ARGUMENT	1
CONCLUSION	5
CERTIFICATE OF SERVICE follows Brief.	
APPENDIX:	
Children and Minors — Uniform Child Custody Jurisdiction Act, H.B. No. 1741	A-1

TABLE OF AUTHORITIES

Cases

Osborn v. Roberts, 169 P.2d 293 (Okla. 1946) 3

Statutes

Title 30, Oklahoma Statutes, Sec. 11 2

Miscellanous

House Bill No. 1741, "Uniform Child Custody Jurisdiction Act" (Oct. 1, 1980) 4

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PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ARGUMENT

Pursuant to Rule 22 the Petitioners respectfully reply to the Brief of Respondent in Opposition to Petition for Writ of Certiorari, filed by Bette Winter, Lori Gay Winter's grandmother, and adoptive mother, in lieu of the Respondent, Glenn Dale Carter, Associate District Judge of the District Court of Pottawatomie County, Oklahoma.

Contrary to the Respondent's statement, this case has not previously been before this Honorable Court. The prior case mentioned by the Respondent challenged on constitutional grounds, an Oklahoma Statute of Limitations per-

taining to adoptions, and it did not in any manner address the questions contained herein relating to the denial of due process and equal protection under the Fourteenth Amendment with regard to the child's best interests and her preference.

The Respondent takes the position that Title 30, Oklahoma Statutes, Section 11, relates to marriage and divorce and the statute is found in the title of marriages. This is not true. The said statute is found in the section of the statutes relating to guardian and ward and is a general statute which was enacted by the Oklahoma Territory Legislature prior to statehood as a guide in awarding custody of a minor and in appointing a general guardian. The statute is quoted in Statutory Provisions Involved, page two, of the Petition for Writ of Certiorari to the Supreme Court of Oklahoma.

The Respondent also states that the Petitioner, Lori Gay Winter, is residing with the Petitioner, Kitty Louise Strouse, her natural mother, in direct violation of an order of the District Court of Pottawatomie County, Oklahoma. The Court's attention is invited to the Order of the Oklahoma Supreme Court, Appendix A of the Petition, wherein the court said "Petitioner's Application to Assume Original Jurisdiction, Petition for Writ of Prohibition and Mandamus is DENIED without prejudice to 12 O.S. 1971, Section 1754 habeas corpus proceeding in Oklahoma, or under Kansas Law . . ." As pointed out on page 10 of the Petition, the Petitioners said that habeas corpus proceedings would be "available only to the grandmother, and then only, if the Petitioners refuse to abide by the Orders of the court regarding the surrender of the custody of the child . . ."

It appears that the Oklahoma Supreme Court recognized the importance of a hearing to determine the child's best interests, but it attempted to shift the responsibility to the Kansas courts. The Oklahoma Supreme Court seemed to endorse a plan of refusing to surrender the child in obedience of an Oklahoma court order and forcing the grandmother to go into the Kansas courts in a habeas corpus proceeding where the matter of best interests could be determined. The Petitioners are attempting to avail themselves of the alternative suggested by the Oklahoma Supreme Court.

Further, the Respondent attempts to convince the Court that the Petitioner, Kitty Louise Strouse, the child's natural mother, is not a foster parent and has no standing. The Respondent also states that all of the cases cited by the Petitioners pertain to divorce or full faith and credit or other matters not relating to adoptions. On the contrary, *Osborn* v. *Roberts,* 169 P.2d 293 (Okla. 1946), cited by the Petitioners on page 6 of the Petition, relates to a three-year-old child who had been residing with her aunt since her mother's death when the child was two days old. The natural father, in a habeas corpus proceeding, attempted to gain custody of the child, but the Oklahoma Supreme Court denied the writ. On page 294 of the opinion the court said, "... there are three rights or interests that are to be given consideration in the following order of importance (1) that of the child, (2) that of the parent, and (3) that of those who have for years discharged all the obligations of parents ..." Clearly, Kitty Louise Strouse, the natural mother, has discharged all of the obligations of a parent for approximately four and one-half years. It is also very clear that

the Oklahoma courts have completely ignored the interests of the child in this case. Kitty does in fact, have standing, and the Federal constitutional rights of the Petitioners have been violated.

Subsequent to the filing of the Petition for Writ of Certiorari to the Supreme Court of Oklahoma, House Bill No. 1741, enacted by the 1980 session of the Oklahoma Legislature, became effective on October 1, 1980. The act is known as the "Uniform Child Custody Jurisdiction Act" (See Appendix hereto).

Section 3 of the act states:

> "The provisions of this act shall apply to all custody proceedings brought within this State, whether as an initial proceeding or modification, and regardless of the absence of jurisdictional dispute."

Section 4 of the act contains definitions. Subsection 8 reads:

> " 'Physical custody' means actual possession and control of a child."

Subsection 9 provides:

> " 'Person acting as parent' means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody."

Section 5, subsection D reads:

> "The *controlling criteria* for *awarding custody* by a court of this state *shall always* be *what is in the best interest of the child, other statutory provisions merely being factors which may be considered.*" (Emphasis supplied)

The aforesaid act contains the provision that it shall be codified in the Oklahoma Statutes as Section 1601 through 1627 of Title 10, and as pointed out by the Respondent, Title 10 of the Oklahoma Statutes contains the provisions relating to the adoption of children.

CONCLUSION

Kitty Louise Strouse, the natural mother of Lori Gay Winter, was awarded her custody when the District Court of Pottawatomie County, Oklahoma vacated the decree of adoption on the 4th day of June, 1976. She has had the child's actual physical custody continuously and has been the person acting as a parent for a period of approximately four and one-half years. The Oklahoma Supreme Court has consistently considered the best interests of a child in awarding custody, except in this case. The legislative policy of Oklahoma since before statehood has been to consider best interests of a child in awarding custody or appointing a general guardian. This long-standing legislative policy has again been reiterated by the Oklahoma Legislature in the Uniform Child Custody Jurisdiction Act of 1980. But the Oklahoma courts have refused to consider Lori's best interests, in direct violation of her rights under the Equal Protection Clause and the Due Process Clause of the Four-

tenth Amendment. A Writ of Certiorari should issue to review the order and judgment of the Supreme Court of Oklahoma.

Respectfully submitted,

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November, 1980

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of November, 1980, three (3) true and correct copies of the foregoing Brief were served by placing same in the U. S. Mail, postage fully prepaid, addressed to Albert W. Murry, 3801 Classen Boluevard, Suite 200, Oklahoma City, Oklahoma 73118, Attorney for Respondent.

All parties required to be served have been served.

Murray Paul McKinney

APPENDIX

OKLAHOMA SESSION LAW SERVICE 1980

CHILDREN AND MINORS — UNIFORM CHILD CUSTODY JURISDICTION ACT

CHAPTER 285[58]

H.B. No. 1741

An Act relating to children; enacting the Uniform Child Custody Jurisdiction Act; providing short title; stating the purpose; providing application; providing certain definitions; providing certain jurisdiction in certain proceedings; providing for notice to certain persons; providing procedure when there are simultaneous proceedings in other states; providing for inconvenient forum; providing certain reasons court may decline jurisdiction; providing that certain information be submitted to court under oath; providing for certain additional parties; providing for appearance of certain parties; providing effect of custody decree; providing recognition; modification and registration of certain custody decrees; providing that certain copies of certain custody decrees be provided; providing method of taking testimony; requiring documents or a hearing or ordering an appearance of parties in another state; providing that District Court shall assist certain courts of another state and shall preserve certain documents for use in another state; providing certain international application; prohibiting certain acts; providing affirmative defenses; directing codification; and providing an effective date.

Be it enacted by the People of the State of Oklahoma:

SECTION 1. *Short title*

This act shall be known as the "Uniform Child Custody Jurisdiction Act".

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[58] 10 O.S. Supp. 1980, §§ 1601 to 1627.

SECTION 2. *Purpose of act*

The general purposes of this act are to:

1. Avoid jurisdictional competition and conflict with courts of other states in matters of child custody which have in the past resulted in the shifting of children from state to state with harmful effects on their well-being;

2. Promote cooperation with the courts of other states to the end that a custody decree is rendered in that state which can best decide the case in the interest of the child;

3. Assure that litigation concerning the custody of a child take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence concerning his care, protection, training and personal relationships is most readily available, and that courts of this state decline the exercise of jurisdiction when the child and his family have a closer connection with another state;

4. Discourage continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child;

5. Deter abductions and other unilateral removals of children undertaken to obtain custody awards;

6. Avoid relitigation of custody decisions of other states in this state insofar as feasible;

7. Facilitate the enforcement of custody decrees of other states;

8. Promote and expand the exchange of information and other forms of mutual assistance between the courts of this state and those of other states concerned with the same child; and

9. Make uniform the law of those states which enact it.

SECTION 3. *Application of act*

The provisions of this act shall apply to all custody proceedings brought within this state, whether as an initial proceeding or modification, and regardless of the absence of jurisdictional dispute.

SECTION 4. *Definitions*

As used in this act:

1. "Contestant" means a person, including a parent, who claims a right to custody or visitation rights with respect to a child;

2. "Custody determination" means a court decision and court orders and instructions providing for the custody of a child, including visitation rights; it does not include a decision relating to child support or any other monetary obligations of any person;

3. "Custody proceeding" includes proceedings in which a custody determination is one of several issues, such as an action for divorce or separation, and includes child neglect or dependency proceedings;

4. "Decree" or "custody decree" means a custody determination contained in a judicial decree or order made in a custody proceeding, and includes an initial decree or a modification decree;

5. "Home state" means the state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six (6) consecutive months, and in the case of a child less than six (6) months old the state in which the child lived from birth with any of the persons mentioned. Periods of temporary absence of any of the named persons are counted as part of the six-month or other period;

6. "Initial decree" means the first custody decree concerning a particular child;

7. "Modification decree" means a custody decree which modified or replaces a prior decree, whether made by the court which rendered the prior decree or by another court;

8. "Physical custody" means actual possession and control of a child;

9. "Person acting as parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody; and

10. "State" means any state, territory or possession of the United States, the Commonwealth of Puerto Rico, or the District of Columbia.

SECTION 5. *Prerequisites for jurisdiction*

A. A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:

1. This state:
   a. is the home state of the child at the time of commencement of the proceeding, or
   b. had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state;
2. It is in the best interest of the child that a court of this state assume jurisdiction because:
   a. the child and his parents or the child and at least one contestant, have a significant connection with this state, and

b. there is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationships;

3. The child is physically present in this state and:

a. the child has been abandoned, or

b. it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected or dependent; or

4. a. It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs 1, 2, or 3 of this subsection, or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and

b. it is in the best interest of the child that this court assume jurisdiction.

B. Except under paragraphs 3 and 4 of subsection A of this section, physical presence in this state of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction on a court of this state to make a child custody determination.

C. Physical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody.

D. The controlling criteria for awarding custody by a court of this state shall always be what is in the best intest of the child, other statutory provisions merely being factors which may be considered.

SECTION 6. *Right to notice and opportunity to be heard*

Before making a decree under this act, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of the child. If any of these persons is outside this state, notice and opportunity to be heard shall be given pursuant to Section 7 of this act.

* * * * *

SECTION 28. *Codification*

Section 1 through 27 of this act shall be codified in the Oklahoma Statutes as Sections 1601 through 1627 of Title 10, unless there is created a duplication in numbering.

SECTION 28. *Effective date*

This act shall become effective October 1, 1980.